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No. 93-A-405

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JAMIE BELGARD-KRAUSE, JANET SQUIRE, and all persons similarly situated,

v. *Petitioners,*

UNITED AIRLINES, a Delaware corporation,

Respondent.

Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In enacting and amending the Federal Aviation Act of 1958, 49 U.S.C.A. §1301-1557, did Congress intend to deprive the state of its traditional power to prevent employment discrimination by a private corporation against persons whom the private corporation perceives may develop a future handicap/disability, particularly here, where applicants have met all federal air regulation requirements for commercial airline pilots.

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UNITED AIRLINES, a Delaware corporation,
Respondent.

Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The order from the Colorado Supreme Court, dated August 23, 1993, denying petitioners' petition for writ of certiorari is at petitioners' Appendix ("App.") 9a. The Colorado Court of Appeals' order denying petitioners' petition for rehearing dated January 28, 1993, is at App. 11a. The Colorado Court of Appeals unpublished opinion dated December 17, 1992, affirming the summary judgment order of the trial court, is at App. 1a.

JURISDICTION

This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1257 (1988). The denial of petitioners' petition for a writ of certiorari was entered by the Colorado Supreme Court on August 23, 1993. App. 9a. On November 12, 1993, this Court granted petitioners an extension of time through December 22, 1993, to file their Petition for a Writ of Certiorari. This Petition is timely pursuant to 28 U.S.C. § 2101 (c) 1988, and SUP. CT. R. 13.4.

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution:

> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.

The Federal Aviation Act of 1958, as amended, 49 U.S.C. §1421(a) (1988):

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation,

standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

3 Code Colo. Reg. 708-1 Rule 60.2[E]:

> Except as provided in paragraphs (2) and (3) of this section, an employer may not conduct a pre-employment medical examination, may not make pre-employment inquiries as to whether the applicant is a handicapped person, and may not inquire about the nature or severity of a physical handicap. An employer may, however, make pre-employment inquiries into an applicant's ability to perform job-related functions.

The Colorado Antidiscrimination Act, Colo.Rev.Stat. § 24-34-402(1)(a) (1986):

> (1) It shall be a discriminatory or unfair employment practice:
>
> (a) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against any person otherwise qualified because of handicap, race, creed, color, sex, age, national origin, or ancestry; but, with regard to a handicap, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer

> can make with regard to the handicap, the handicap actually disqualifies the person from the job, and the handicap has a significant impact on the job;

Federal Air Regulation, Requirements for Certificates, Ratings, and Authorizations, 14 C.F.R. § 61.3(c) (1973):

> (c) Medical certificate. Except for free balloon pilots piloting balloons and glider pilots piloting gliders, no person may act as pilot in command or in any other capacity as a required pilot flight crew member of an aircraft under a certificate issued to him under this part, unless he has in his personal possession an appropriate current medical certificate issued under Part 67 of this chapter. However, when the aircraft is operated within a foreign country with a current pilot license issued by that country, evidence of current medical qualification for that license, issued by that country, may be used. In the case of a pilot certificate issued on the basis of a foreign pilot license under § 61.75, evidence of current medical qualification accepted for the issue of that license is used in place of a medical certificate.

Federal Air Regulation, First Class Medical Certificate, 14 C.F.R. § 67.13 (1982):

> (a) To be eligible for a first-class medical certificate, an applicant must meet the requirements of paragraphs (b) through (f) of this section.

(b) Eye: (1) Distant visual acuity of 20/20 or better in each eye separately, without correction; or of at least 20/100 in each eye separately corrected to 20/20 or better with corrective lenses (glasses or contact lenses) in which case the applicant may be qualified only on the condition that he wears those corrective lenses while exercising the privileges of his airman certificate.

(2) Near vision of at least v=1.00 at 18 inches with each eye separately, with or without corrective glasses.

(3) Normal color vision.

(4) Normal fields of vision.

(5) No acute or chronic pathological condition of either eye or adenexae that might interfere with its proper function, might progress to that degree, or might be aggravated by flying.

(6) Bifoveal fixation and vergencephoria relationship sufficient to prevent a break in fusion under conditions that may reasonably occur in performing airman duties.

Tests for the factors named in paragraph (b)(6) of this section are not required except for applicants found to have more than one prism diopter of hyperphoria, six prism diopters of esophoria, or six prism diopters of exophoria. If these values are exceeded, the Federal Air Surgeon may require the applicant to be

examined by a qualified eye specialist to determine if there is a bifoveal fixation and adequate vergencephoria relationship. However, if the applicant is otherwise qualified, he is entitled to a medical certificate pending the results of the examination.

STATEMENT

I. United Airlines' Discriminatory Preemployment Genetic and Medical Screening

Petitioners, who are medically certified by the Federal Aviation Administration ("FAA") to fly commercial airlines and hold Class I medical certificates issued by the FAA, have a past history of eye surgery (radial keratotomy) with no side effects. The petitioners have met all federal regulatory standards for physical requirements and eye sight requirements mandated by federal air regulations for commercial airline pilots. United Airlines ("United") denied petitioners' employment as pilots based upon United's policy to medically screen applicants for potential shortened careers in an effort to save money by weeding out applicants who United believed could manifest a handicap or disability sometime in the future.

United's practice of preemployment genetic and medical screening of applicants for pilot positions is unlawful under Colorado law which explicitly prohibits employers from asking job applicants medical questions before extending a job offer. 3 Code Colo. Reg. 708-1 Rule 60.2(E). The Colorado law is modeled upon federal law which similarly explicitly prohibits preemployment medical inquiries. Section 504, 45 C.F.R. § 84.14 (HHS); 49 C.F.R. §27.37 (the Department of Transportation).

Before being offered a job as a pilot for United, petitioners were required to complete a medical questionnaire asking whether the applicant or any members of the applicant's family including, grandparents, aunts and uncles, have ever experienced any illnesses or diseases set out in an enumerated list on the application. United's admitted, undisputed purpose for the practice is cost-savings. United's medical booklet states that its medical screening is designed "to obtain new-hire pilots who have the lowest risk of a shortened career due to incapacitating health problems" because of the "obvious economic impact on the company...."

Petitioner Janet Squire had been employed as a flight simulator engineer with United Airlines at its Flight Training Center in Denver, Colorado since 1980. With a career objective of becoming a flight officer (pilot), Ms. Squire repeatedly applied for openings for that position beginning in 1984. Petitioner Jamie Belgard-Krause had been employed as a flight instructor with United Airlines at the Flight Training Center in Denver, Colorado since 1981. With a career objective of becoming a flight officer (pilot), in 1986, Ms. Belgard applied for a flight officer position (pilot) with United Airlines.

Petitioners learned that they had been disqualified by United in their various pilot applications because they had a history of eye surgery (radial keratotomy). The radial keratotomy surgery had corrected both petitioners' visual acuity to exceed the federal regulations pertaining to eyesight requirements for commercial pilots and corrected both petitioners' visual acuity to exceed United's own standards for new hire pilots. Petitioners learned that incumbent pilots with United were flying commercial jets despite a history of the same eye surgery. They also became aware that other

commercial airline carriers did not impose a blanket disqualification based on a history of radial keratotomy surgery. Neither Petitioner experienced any side effects from the surgery; nor do they have any detectable conditions from the surgery. Because both petitioners met all federal regulatory standards for commercial pilots, both were medically certified to be commercial pilots by the FAA, and both held Class I medical certificates issued by the FAA.

Petitioners brought an action in Denver District Court for the State of Colorado challenging United's failure to provide them individualized consideration of their perceived handicaps pursuant to Colorado's antidiscrimination law, Colo.Rev.Stat. § 24-34-402 (1986). Petitioners also brought a claim pursuant to Colorado state regulation seeking to enjoin United's preemployment medical and genetic screening. 3 Colo.Reg. 708-1 Rule 60.2 E. Finally, petitioners sought to represent a class of applicants who held first class medical FAA certificates to fly commercial aircraft, but who were rejected during United's unlawful preemployment medical screening process. Summary judgment was entered on behalf of United and against petitioners. The lower court found that petitioners' state law claims were preempted by 49 U.S.C. 1305(a). The Colorado Court of Appeals affirmed the judgment on December 17, 1992, App. 1a. The Colorado Supreme Court denied petitioners' petition for certiorari on August 23, 1993. App. 9a.

II. Federal Regulation of Pilot Qualifications

United moved for summary judgment against petitioners on the grounds that the Federal Aviation Act preempted enforcement of the state handicap law. United argued that the comprehensive federal scheme shows safety is

a matter committed "exclusively" to air carriers. United then argued that the 1978 amendment to the Airline Deregulation Act preempting state laws that "relate to rate, routes and services," expressly preempts operation of the Colorado state antidiscrimination law as applied to discrimination claims based on perceived possible, future handicap/disabilities.

Federal air regulations, enacted by the FAA under the Federal Aviation Act set forth specific medical and eyesight requirements for commercial airline pilots. These federal air regulations set forth specific standards which are implemented by a designated FAA aviation medical examiner. Medical and visual federal standards for commercial airline pilots are found at: 14 C.F.R. § 61.3(c), Requirements for Certificates, Rating and Authorizations, Medical Certificate; 14 C.F.R. § 67 et seq., Medical Standards and Certification; 14 C.F.R. § 67.13(b), First-Class Medical Certificates, Eye.

Both petitioners met or exceeded all medical and visual prerequisites for commercial airline pilots required by federal air regulations promulgated under the Federal Aviation Act. Because both petitioners met all federal air regulation medical and visual requirements for commercial airline pilots, petitioners were issued first class medical certificates by the Federal Aviation Administration.

There is no provision in the federal air regulations or the Federal Aviation Act allowing an air carrier to conduct a genetic screening test on a commercial airline pilot applicant. There is no requirement in the federal air regulations or the Federal Aviation Act that a commercial airline pilot pass a genetic screening test prior to becoming a commercial airline pilot. Further, there is no requirement in the federal air regulations or the Federal Aviation Act that a commercial

airline pilot be free from a possible genetic predisposition towards future health problems. The only entity that requires applicants to pass genetic screening inquires prior to becoming a commercial airline pilot is United Airlines.

III. Federal - State Antidiscrimination Regulatory Scheme

In 1963, Colorado enacted its antidiscrimination statute prohibiting discrimination in employment on various bases, including race. Colo.Rev.Stat. § 24-34-402.

The constitutional power of the State of Colorado to prohibit discrimination by an airline in its pilot hiring procedure was recognized by this Court in the landmark case, Colorado Antidiscrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1963). In that case, the airline claimed that the federal aviation regulatory scheme, by express and implied preemption, preempted operation of the Colorado antidiscrimination statute to preclude review of a claim of racial discrimination in hiring.

Acknowledging that "[t]he Civil Aeronautics Board and the FAA have indeed broad authority over flight crews of air carriers, much of which has been exercised by regulations," this Court concluded that "Congress in the Civil Aeronautics Act of 1933 and its successor had no express or implied intent to bar state legislation in this field." "[T]o hold that a state statute, identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute." Colorado Antidiscrimination Comm'n v. Continental Airlines, 372 U.S. 714, 722-724 (1963).

In 1979, Colorado amended its antidiscrimination statute to include protection for persons with handicaps. In Colorado Civil Rights Comm'n v. Fire Protection Dist., 772 P.2d 70, 76 (Colo. 1989), the Colorado Supreme Court recognized that the state handicap employment regulations were identical to federal handicap employment regulations. The Colorado Supreme Court adopted the analysis established by this Court in the decision, Arline v. School Bd. of Nassau County, 480 U.S. 273 (1987), that individualized inquiry is "essential if Section 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks." Id.

Virtually every state has enacted some legislative protections for persons with handicaps/disabilities. The Colorado state protections against discrimination on the basis of real or perceived disabilities are similar to protections enacted in 47 states.

REASONS FOR GRANTING THE PETITION

I. Dangerous Precedent Has Been Established by the Colorado Court of Appeals, Undermining the Federal - State Regulatory Scheme Which Prohibits Discrimination Based On Future, Unknown Disabilities.

Preemption of the traditional power of the state to enact laws to protect its citizens is an extraordinary occurrence. Rarer still is the preemption of a state employment anti-discrimination law by an ambiguous federal law where the state law is identical in purpose to a separate federal anti-

discrimination law. In fact, apart from the decisions reversed by this Court in Colorado Antidiscrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1963), and in Shaw v. Delta Airlines, 463 U.S. 85 (1983) (rev'd in part), no case has approved such a drastic application of the preemption doctrine.

The opinion below conflicts with legal principles governing preemption established by this Court, contradicts the position of the administrative agency which regulates air carriers, eviscerates important protections for persons with perceived, possible, future handicaps/disabilities, imperils state regulation of discriminatory employment, and disturbs the Congressionally established federal - state regulatory scheme to enforce anti-discrimination laws.

In a recent five to three decision, this Court in Morales v. Transworld Airlines, Inc., 112 S.Ct. 2031 (1992), addressed one prong of the Airline Deregulation Act preemptive provision, "relating to rates." In contrast, the questions presented in this case involve the definition and scope of the term "services" and whether the term "services" should be so broadly expanded as to authorize discrimination against qualified job applicants based on sheer medical conjecture that the employer may save money in the future.

The Colorado appellate court found that petitioners' claims were expressly preempted by the Federal Aviation Act reasoning that the terms "relates to" and "services" as used in Section 1305 encompass a private commercial air carrier's internal hiring standards. This expansion of both the breadth and scope of the express provision is contrary to Congressional intent in enacting the Federal Aviation Act and undermines the federal - state regulatory scheme of protecting persons with perceived handicaps/disabilities. Under the

broad formulation of the opinion below, any action in which an airline engages is preempted from any type of state claim.

This Court has recognized the limited utility of prior cases on preemption since "each case turns on the peculiarities and special features of the federal regulatory scheme in question." City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638 (1973). While the majority attempted to limit its holding in Morales, confusion and conflicts by the lower courts continue to undermine long standing precedent such as Colorado Antidiscrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1963). Confusion will reign until this Court definitely examines another prong of the Airline Deregulation Act's preemptive provision, the term of art "services."

A. The Court of Appeals Erroneously Expanded the Breadth and Scope of the Term "Services" In The Airline Deregulation Act

Federal law preempts state law under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, in three circumstances. First, Congress may explicitly direct when and to what extent its enactment preempts state law. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Second, state law is preempted even in the absence of an express statutory directive, if "it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." English v. General Electric Co., 110 S.Ct. 2270, 2275 (1990). Finally, "state law is preempted to the extent that it actually conflicts with federal law." Id.

In each case, preemption remains "fundamentally...a question of congressional intent." English, 110 S.Ct. at 2275. In each case, that inquiry is informed by the "presuppositions

of our embracing federal system," including the principle that democracy is promoted by the "diffusion of power." San Diego Unions v. Garmon, 359 U.S. 236, 243 (1959). Thus, United must overcome the presumption that Congress did not intend to preempt state law in areas such as health, safety, and employment discrimination which are traditionally regulated by the States. (See, Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 715 (1985); Colorado Antidiscrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1963); and California v. ARC America Corp., 109 S.Ct. 1661, 1665 (1989).) Rather, when Congress legislates in such an area, "we start with the assumption that the historic police powers of the States were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress." Id.

Regardless under which preemption standard the present case is judged, United can make no such demonstration and the Colorado Court of Appeals misapplied the preemption analysis in finding that petitioners' state claims were preempted.

If there is a universally accepted principle in the law on federal preemption, it is that the controlling consideration is Congress' intent in enacting the federal statute. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 738 (1985); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152 (1982); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). In Shaw, this Court stated that "[i]n deciding whether a federal law preempts a state statute, [the] task is to ascertain Congress' intent in enacting the federal statute at issue." Shaw, 463 U.S. at 95.

The legislative history of the Airline Deregulation Act of 1978 shows that § 1305(a) was enacted to address jurisdictional issues created as a result of deregulation. H.R. Rep. No. 1211, 95th Cong., 2nd Sess. 16, reprinted in 1978 U.S. Code Cong. & Admin. News 3751-3752, 3804-3805. This limited provision was needed to draw new boundaries between local and federal control as a result of deregulation.

The 1978 Airline Deregulation Act was "landmark legislation":

> It was the first of a series of laws converting most of the transportation industry from a system of protective regulation, in which service and fares were determined by government decision, to a deregulated system in which service and fares were determined by the competitive marketplace.

H.R. Rep. No. 98-793, 98th Cong., 2nd Sess. reprinted in 1984 U.S. Code Cong. & Admin. News 2857.

In 1986, Congress again amended the Federal Aviation Act, 49 U.S.C. §1374, through the Air Carrier Access Act of 1986 (ACAA), which amended § 404 of the Federal Aviation Act to prohibit discrimination against passengers on the basis of handicap by all air carriers. Section 404(c) of the Federal Aviation Act, 49 U.S.C. 1374(c). In connection with issuance of the final regulation implementing the statutory amendment, 49 U.S.C. § 1374, the Department of Transportation specifically addressed the federal - state statutory scheme for employment qualifications and the express preemption provision of the Airline Deregulation Act.

In the commentaries, the Department of Transportation expressly addressed the preemption provision relied upon by United here. The Department of Transportation stated that "providing transportation to passengers is clearly a 'service' within the meaning of 49 U.S.C. 1305(a)(1)." Even though the Department declares that "there is a strong likelihood that state action on matters covered by [the] rule will be regarded as preempted," the Department will rule on matters on a case-by-case basis. 55 Fed. Reg. 8014, 14 C.F.R. §382.

In the process of debating the proposed regulations, the disability groups urged the Department of Transportation to require nondiscrimination in the hiring of pilots by air carriers:

> "PVA said that the rule should require nondiscrimination on the basis of handicap in carriers' employment practices, at least for those jobs involved in the provision of air transportation. Since the statute applies to carriers 'in the provision of air transportation,' and since pilots, baggage handlers, ticket agents, etc. do work related to providing air transportation, PVA argued, the statute should be read to prohibit discrimination in filling such positions."

55 Fed. Reg. 8015 R. 362, 14 C.F.R. §382.

In rejecting this proposal, the Department of Transportation specifically declined to extend its regulatory coverage of "services" to include employment and noted:

> Carriers, like other private employers, are subject to various Federal **and state**

> requirements for nondiscrimination in employment. It is these requirements, not the ACAA, that would provide recourse for any person who believed that a carrier had discriminated in employment.

55 Fed. Reg. 8016 (codified at 14 C.F.R. Part 382.3) (emphasis supplied).

This Court recently reaffirmed that the preemption analysis "starts with the assumption that the historic police powers of the States are not to be superseded...unless that is the clear and manifest purpose of the Congress." Cipollone v. Liggett Group, Inc., 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (emphasis supplied).

In Colorado Antidiscrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1963), this Court interpreted the identical state discrimination statute prohibiting race discrimination, and held that the federal regulatory scheme must be frustrated by the state law before preemption will render the state law a nullity.

Section 1305 is unquestionably an express preemption provision. Hence, under Cipollone, the question becomes not whether Congress intended to preempt state laws relating to an airline's services, but rather to what extent that preemption was intended.

In Morales v. Transworld Airlines, Inc., 112 S.Ct. 2031 (1992), a case decided weeks before Cipollone, this Court held that 49 U.S.C. § 1305(a) preempted the guidelines adopted by the National Association of Attorneys General (NAAG) to regulate airline fare advertising.

The Morales majority wrote:

> In this case, as in Shaw, "[t]he present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line."

Morales v. Transworld Airlines, Inc., 112 S.Ct. 2031, 2040 (1992).

The majority in Morales v. Transworld Airlines, Inc., 112 S.Ct. 2031 (1992), found it unnecessary to review legislative history to determine the extent of preemption of rates presented in that case. While Morales did not present borderline questions, this case cries out for clarification by this Court. Misconstruing Morales, the opinion below undermines the established balance between state and federal regulation of employment discrimination which was so carefully analyzed by this Court in Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), and in Colorado Antidiscrimination Comm'n v. Continental Airlines, 372 U.S. 714 (1963).

Contrary to the position of the federal administrative agency which administers the Federal Aviation Act, the Colorado Court of Appeals mistakenly concluded that the preemption of airlines' services extends to preempt laws regulating discrimination in hiring the employees who provide the services. The necessary conclusion of this holding would be to carve out of state laws any state employment regulation related to "providing" services or goods or similar notions. By definition, employees are related to "providing" whatever the employer produces or provides. In addition, the opinion below, logically extended, would immunize airlines from any

state claims simply because the action relates to the services of an airline.

Different from Morales, here, the scope of the word "services" is the key inquiry. Just as the word "service" has a specific meaning in religion and in the game of tennis, it has a particular meaning in the aviation industry. It is this term of art meaning which Congress used continually throughout the legislative history. The legislative history of the Federal Aviation Act indicates that the term "service" was used by Congress as providing air transportation to the flying public from point to point, not pilot qualifications. See, e.g., Statement of General Policy, Implementation of Preemption Provisions of the Airline Deregulation Act of 1978, 44 Fed. Reg. 9948, 9951 (1979).

The Legislative history of the Act indicates that "services" had a narrow meaning. The Federal Aviation Act does not define the term "services." However, a close review of the Deregulation Act's history demonstrates that Congress used the word "services" merely to describe the type and quality of services provided and did not mean to allow such services to be rendered in a discriminatory manner. (See, House Comm. On Pub. Works And Transportation, 96th Cong., 1st Sess., Legislative History Of The Airline Deregulation Act Of 1978 (Comm. Print 1979).) When the Deregulation Act was considered, Congress confronted a "confusing system of dual regulation of federal air carriers that had evolved in some states," which affected various aspects of airlines' economics and operations. (See, S.Rep. No. 95-631, 95th Cong., 2d Sess. 98 (1978), "Senate Report".) Of particular concern was an effort by some states to regulate the intrastate fares charged by interstate airlines.

The Senate version of the Act attempted to balance competing state and federal interests by allowing the states to regulate airlines which derived at least 50 percent of their revenues from intrastate operations. Any other effort to regulate the "routes, schedules, or rates, fares, or charges in tariffs, of, or otherwise promulgate economic regulations for" any airline licensed by the CAB would have been expressly preempted by adding a new section 423 to the Federal Aviation Act. See, S.Rep No. 2493, §17, 95th Cong. 2nd Sess. (1978), reprinted in the Senate Report at p. 39.

The words "service" or "services" did not appear in the Senate bill or report, but did appear in the House version which was adopted as §1305. See, H.R.Rep. No. 95-1211, 9th Cong. 2d Sess. 15 (1978) ("House Report"). The phrase "rates, routes or services" and the word "service" were used by the House in a very limited context. A detailed discussion of the legislative history of §1305 is found in the Journal of Air Law & Commerce. See, Davison & Halloway, The Two Faces of Section 105 [1305] - Airline Shield or Airport Sword, 56 J. Air L. & Comm. 93, 105-110 (1990). Several important facts are recited by the article: At a floor debate on September 23, 1977, Representative Glenn Anderson, the primary sponsor of the bill, presented a section-by-section analysis of the proposed Deregulation Act. According to Representative Anderson, the preemption provision was "intended to prevent the states from asserting regulatory responsibility in areas intentionally deregulated by the federal government." Id. at 108. The discussion continues:

> Anderson stated that airline deregulation legislation, might result in state enactment of regulatory legislation "imposing restrictive utility-type regulation on interstate airline

> service and fares." To counteract this possibility, the proposed airline deregulation bill contained a specific statutory provision intended to prohibit states from taking such actions. Id.

An established method to determine Congressional intent is to look at the meaning Congress gave words when Congress enacted the legislation. St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 546 (1978) (statutory language to be read in light of customary understanding of words at time of enactment). An examination of several federal regulations demonstrates that "service" is often used to describe the type and frequency of operations offered to passengers. For instance, anyone seeking a license to operate an airline must submit an application containing a "statement as to the type of aircraft [the] applicant proposes to use in the new service and whether such aircraft is presently owned by the applicant."

Another federal rule defines an airline's "route authority" as authority "to provide service between and among various points except the service which has been designated as essential air service (i.e., the small community guaranteed service program)." Yet another regulation states that a "substantial change in operations" is defined as including "changes in operations from charter to scheduled service or a large increase in the number of markets served." Finally, there is 14 C.F.R. §298.21(c)(iv), which exempts small air-taxi operators from certain federal economic regulations. This regulation specifies that applicants or registrants such as air taxi operators must describe the type of service the carrier will offer its scheduled passengers, scheduled cargo, mail under a U.S. postal services contract, on-demand passenger, on-demand cargo, or other service such as air ambulance

operations, fire fighting or seasons operations. Taken together, these regulations demonstrate that the term "service" or "services" often describes only the type of operations offered to passengers and not the manner in which they are provided.

The entire history, including the bills, the reports, and the floor debates, focuses on utility-type regulation of fares, routes, schedules and aircraft type. In fact, the House version was entitled, the "Air Service Improvement Act," and it did not require more careful flight attendants. Its goal was to increase the flight options available to the public.

The legislative scheme adopted by Congress from 1938 forward shows the lack of Congressional intent to regulate all activities involving airlines. When Congress adopted the FAA in 1958, it even added a savings clause to emphasize that dual regulation was the norm. Section 1106 of the FAA provides that, "nothing contained in this chapter shall in any way amend or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." See, 49 U.S.C. §1506.

This provision signifies that Congress, not having expressly indicated otherwise, did not intend to occupy the entire field of regulation of airline discriminatory practices -- a field which has been subject to state regulation. (See, International Paper Co. v. Ouellette, 479 U.S. 481, 492 (1987), which stated that such a savings clause can actually "negate the inference that Congress left no room for state causes of action.")

B. Misconstructions and Conflicts With Decisions Of This Court

The court of appeals misapplied Morales v. Transworld Airlines, Inc., 112 S.Ct. 2031 (1992), a case decided weeks before Cipollone. In Morales, this Court held that 49 U.S.C. §1305(a), preempted the guidelines adopted by the National Association of Attorneys General (NAAG) to regulate airline fare advertising. The majority wrote that for purposes of that case, "the key phrase," obviously, is "relating to." Id. at 2037. The majority wrote that the NAAG guidelines "quite obviously...relate to fares." Id. at 2039. Thus, while Morales provides some guidance on the breadth of the preemption provision in interpreting the "relates to" language of Section 1305, it does not address the scope of preemption contained in the "services" language of Section 1305. The court below erred in collapsing two independent inquiries into one.

Even a broad reading of the "relates to" language has limitations. The Morales majority noted the similarity of the "relates to" language in Section 1305(a)(1) with the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a). Id. at 2037, See, also dissenting opinion (per Justice Stevens), Id. at 2054-2055, citing Shaw v. Delta Airlines, 463 U.S. 85 (1983). In Shaw, this Court held that ERISA preempted a New York state employment discrimination statute prohibiting discrimination in employee benefit plans based on pregnancy. Simultaneously, however, this Court decided that ERISA did not preempt the state employment discrimination statute to the extent it prohibited employment discrimination in hiring, promotion, and salary.

In Shaw, this Court reasoned that the state law "relates to" an employee benefit plan if it has a connection or reference to such a plan. Shaw, 463 U.S. at 97, 103 S.Ct. at 2900. In Morales, the majority applied this reasoning and concluded that "[i]n its terms, every one of the guidelines enumerated [by the NAAG] bears a 'reference to' air fares." Morales, 112 S.Ct. 2031, 2039 (1992). Here, the state employment discrimination statute neither makes "reference" to "services," nor relates to "services."

The Morales decision does not detract from the significant principle established in Colorado Antidiscrimination Commission, that held when federal and state laws are identical in purpose, another purportedly preemptive federal law must, to some extent, be frustrated before preemption invalidates the state law. The Morales majority noted:

> State and federal law are in fact inconsistent here - the Department of Transportation opposes the obligations contained in the guidelines, and Texas law imposes greater liability...." Morales, 112 S.Ct. at 2038.

In this case, by contrast, the Department of Transportation recognizes that [c]arriers, like other private employers, are subject to various Federal and **state requirements for nondiscrimination in employment**. See, 55 Fed. Reg. 8016 (codified at 14 C.F.R. Part 382.3), (emphasis supplied), interpreting regulations implementing 49 U.S.C. §1374, part and parcel of the Federal Aviation Act. Moreover, the state discrimination statute does not require the hiring of an individual with a handicap who is not qualified for the job. See, Colo.Rev.Stat. §24-34-402.

In a similar situation in Hodges v. Delta Airlines, Inc., 4 F.3d 350 (5th Cir.) (1993), the court was presented with the question whether a tort claim for physical injury based on an unsafe condition in an airplane is preempted by section 1305 of the Airline Deregulation Act of 1978. The court specifically addressed the definition and the scope of the term "services" in section 1305 of the Airline Deregulation Act. The court recognized that under Morales, the scope of state laws that "relate to" services must be broadly interpreted, but that the nature of the "services" preempted by section 1305(a) is more narrow. The court concluded that:

> Considering the definition of "services" that is most plausible in light of the ADA's purpose and historical regulatory antecedents, it appears that "services" is not coextensive with airline "safety." Hodges v. Delta Airlines, Inc., 4 F.3d 350, 354 (5th Cir.) (1993).

In Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984), this Court recognized that the use of general language in Congressional statutes would occasionally result in situations where reasonable persons could disagree over a text's application to a specific practice. In such situations, this Court held that substantial deference was due to the plausible reading of the Congressional text adopted by the administrative agency vested with responsibility for implementing Congress' will.

In connection with issuance of the final regulation implementing the statutory amendment, 49 U.S.C. § 1374, the Department of Transportation specifically addressed the federal - state statutory scheme for employment qualifications and the express preemption provision of the Airline Deregulation Act.

The Department of Transportation noted that it is required to achieve two objectives: that carriers not discriminate and that its rules be consistent with the safe carriage of all passengers. See, 55 Fed. Reg. 8012 (codified at 14 C.F.R. Part 382) R. 359. The Department concluded:

> 49 U.S.C. 1421(b) refers to maintaining "the highest degree of safety." This statement, which in context refers to a consideration that the FAA is to take into account in developing its safety rules, does not constitute a legal basis on which carriers may ignore nondiscrimination requirements. Nor, realistically, can it be read as a legal mandate that carriers take every action that would arguably enhance safety. Newer aircraft may well be safer than older aircraft. More experienced pilots may well be safer than less experienced pilots. It may be safer never to carry any children or elderly persons, and to concentrate on carrying only able bodied adults.... Yet no one, least of all ATA, would argue that carriers must ground their old planes and young pilots....
>
> The several employment practices cases ATA cites do not stand for the proposition that an assertion of a safety rationale for a carrier practice must necessarily triumph over nondiscrimination requirements. They simply stand for the proposition that there are some fact situations that lead courts to conclude that a particular carrier practice involves a bona fide occupational qualification or business necessity. That a court believes that a carrier

> has shown a sufficient safety rationale to establish that a 62 year old flight engineer or a pregnant flight attendant should not be employed does not demonstrate that the Department of Transportation is legally precluded from implementing the ACAA in a way that constrains carrier discretion. (emphasis supplied)

The Department of Transportation commentaries explain that "[a]bsent other legal constraints, carriers have the discretion to impose additional requirements intended to enhance safety." See, 55 Fed. Reg. 8012, 14 C.F.R. §382. Thus, unlike settings in which an agency has merely adopted a "litigating position," Department of Transportation's position on § 1305 warrants Chevron deference. See, Bowen v. Georgetown University Hospital, 488 U.S. 204, 212-213 (1988).

The court below erroneously expanded the breadth of the preemption provision by misinterpreting the "relates to" language of Section 1305. The court erroneously expanded the scope of the preemption provision by misinterpreting the "services" language of Section 1305. Taken together, the court of appeals' interpretation immunizes an airline carrier from any legal actions based on state statutory or common law claims. Under the reasoning of the court below, there is no material distinction between the facts of In re Air Crash Disaster at Stapleton Int'l Airport, 721 F.Supp. 1185 (D.Colo. 1988), a case involving state law tort claims arising out of the tragic deaths of passengers, and the discriminatory hiring practice presented here. It is difficult to imagine any activity in which an airline engages that does not somehow "relate to services" as interpreted by the court of appeals.

No court has yet confronted the far-reaching consequences of this deceptively overbroad reasoning adopted by the court of appeals. There is no indication in the relevant opinions by this Court that FAA preemption should deprive state citizens of actions to vindicate rights simply because the state action arises out of factual settings involving air carriers.

Moreover, while rendering its decision on grounds of federal preemption, a careful review of the analysis by the court of appeals shows it is insidiously infused with the very fears and presumptions which the handicap laws were designed to deter. Petitioners are not asking the Court to require air carriers to hire blind pilots. Notably, pilots with a history of this type of surgery are flying for commercial airlines. Petitioners are seeking individualized consideration of their presumed handicaps as required by Colorado and federal law. The decision below renders statutory protections for persons with actual or perceived disabilities/handicaps meaningless. The decision is contrary to preemption principles established by this Court. The need for review by this Court is compelling.

CONCLUSION

The purpose of the federal preemption doctrine is to preserve the supremacy of federal law and federal regulations. U.S. Constitution Article VI Cl.2. United is not a branch of the Federal Aviation Administration and is not implementing federal air regulations when it requires pilot applicants to pass genetic predisposition testing. Therefore, United is not protected by the federal preemption doctrine when its hiring policies are discriminatory.

United can establish stricter pilot hiring standards than required by federal air regulations. However, this does not mean that United is free to implement hiring policies in violation of state employment discrimination laws. It is undisputed that pre-employment inquires used to predict if an applicant is genetically predisposed to a future disability, if non-job related, violate Colorado's employment discrimination laws and regulations.

Federal preemption cannot be misused by a private corporation to protect its own internal discriminatory genetic hiring standards which have no basis, no requirement, or no relation to federal statutes or regulations. United Airlines has misused the preemption doctrine to shield its discriminatory hiring policies.

When a pilot applicant has met all federal requirements for the position, United cannot discriminate against such applicant under the cloak of federal preemption. United's own internal standards must still comply with state employment discrimination laws. United is perverting the federal preemption doctrine to protect its discriminatory hiring policies. This is a blatant misapplication of the preemption doctrine.

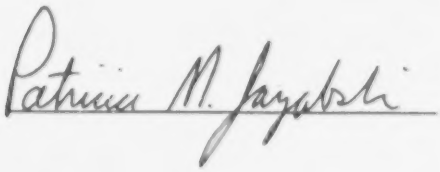
The Colorado Court of Appeals has departed from compelling principles established by this Court. The Colorado Court of Appeals has established dangerous precedent in misapplying the federal preemption doctrine.

This is a case of first impression that requires rectification by certiorari review.

DATED: December 22, 1993

Respectfully submitted,

SCHADEN, LAMPERT & LAMPERT

By: 

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No. 93-A-405

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JAMIE BELGARD-KRAUSE, JANET SQUIRE, and all persons similarly situated,

v. *Petitioners,*

UNITED AIRLINES, a Delaware corporation,

Respondent.

PETITIONERS' APPENDIX

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COLORADO COURT OF APPEALS DECEMBER 17, 1992
No. 91CA0646

Jamie Belgard and Janet Squire,
Plaintiffs-Appellants and Cross-Appellant.

v.

United Airlines, a Delaware corporation,
Defendant-Appellee and Cross-Appellant.

Appeal from the District Court of the City and County of Denver
Honorable John W. Coughlin, Judge
No. 89CV9781

Division III JUDGEMENT AFFIRMED
Opinion by JUDGE CRISWELL
Smith and Rothenberg, JJ., concur

Lynn L. Palma, Denver, Colorado; Schaden, Lampert & Lampert, Brian J. Lampert, Bruce A. Lampert, Patricia M. Jarzobski, Denver, Colorado, for Plaintiffs-Appellants and Cross-Appellees

Rothgerber, Appel, Powers & Johnson, Michael D. Nosler, Samuel M. Ventola, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

Plaintiffs, Jamie Belgard and Janet Squire, are employees of the defendant, United Air Lines, Inc. They instituted this action against United and sought to represent a class of individuals who were allegedly similarly situated, claiming that they were denied employment as pilots with United because they had undergone surgery that was designed to alleviate the effects of myopia. They asserted that this denial of employment constituted discrimination based on a perceived physical handicap in violation of §24-34-402(1)(a), C.R.S. (1988 Repl. Vol. 10A). However, the trial court, concluding that plaintiffs' claims were preempted by federal statutes regulating the aviation industry, entered summary judgment dismissing those claims. Plaintiffs appeal from that judgment, and we affirm.

Section 24-34-402(1)(a) declares that an employer's refusal to promote an otherwise qualified person "because of a handicap," constitutes an unlawful employment practice, unless there is "no reasonable accommodation" that can be made with regard to such handicap. Other statutes create the Colorado Civil Rights Commission, §24-34-303, C.R.S. (1988 Repl. Vol. 10A), and establish procedures for the filing of charges of discrimination with this commission and for their administrative determination. Sections 24-34-306 and 24-34-307, C.R.S. (1988 Repl. Vol. 10A). In addition, the commission is delegated the authority to adopt rules and regulations to implement the provisions of §24-34-402(1)(a). Section 24-34-305, C.R.S. (1988 Repl. Vol. 10).

In accordance with this delegation of authority, the commission has promulgated Civil Rights Commission Rule 60.2(E), 3 Code Colo. Reg. 708-1, which prohibits an employer for making pre-employment inquiries respecting the "nature or severity of a physical handicap," although inquiries limited to a job applicant's "ability to perform job-related functions" are permissible.

Plaintiffs' complaint contained two claims for relief.

The first, based upon the provisions of §24-34-402(1)(a) itself, asserted that United had denied each of them promotion to the position of flight officer solely because they had undergone radial keratotomy surgery, designed to alleviate the effects of myopia. They asserted that such surgery did not render them incapable of performing the duties of such position and affirmatively asserted that each of them possessed a proper airman's certificate evidencing their physical qualifications to perform the necessary job functions.

In their second claim, plaintiffs relied upon Rule 60.2(E). They alleged that United made it a practice to inquire of prospective job applicants respecting their prior physical history of diseases and injuries, as well as the prior medical history of their parents and other relatives. The purpose of such information, according to plaintiffs, was to allow United to predict the future health of a prospective employee.

I.

In asserting that plaintiffs' state law claims have been pre-empted, both expressly and impliedly, by the provisions of the Airline Deregulation Act of 1978, 49 U.S.C. App. 1301, et seq. (1992), United relies both upon the comprehensiveness with which this federal legislation has occupied the field of aviation and upon the specific provisions of 42 U.S.C. App. 1305 (1992). This latter statute says that:

> [N]o state or political subdivision thereof. . . shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes or services of any air carrier . . . . (emphasis supplied)

We agree that this federal legislation prevents the enforcement against airlines of Colorado's handicap discrimination law.

The concept that federal enactments may prohibit

the enforcement of state laws is grounded upon the constitutional provision that the laws of the United States, made pursuant to the national constitution, "shall be the supreme law of the land." U.S. Const. art. VI.

Hence, any state law that conflicts with federal legislation, either directly or because its enforcement would stand as a barrier to the accomplishment of the full purposes and objectives of Congress, cannot be enforced. Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941); Brubaker v. Board of County Commissioners, 652 P.2d 1050 (Colo. 1982). See also Maryland v. Louisiana, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).

However, even if there is no conflict, as such, between the two pieces of legislation, a state enactment or other state law may be rendered inoperative because of an express statement by Congress of its intent that the federal law shall foreclose state action, i.e., the state law is expressly pre-empted. Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). See Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 105 S.Ct. 2371, 85 L. Ed.2d 714 (1985); Brubaker v. Board of County Commissioners, supra.

Finally, even if there is no express statement by Congress respecting pre-emption, the nature of its statutory enactment may nevertheless give rise to an inference of an intent to pre-empt. This inference may arise in a variety of circumstances, including those in which it is apparent that the federal interest is so predominant that a uniform policy is required. See generally Hillsborough County v. Automated Medical Laboratories, Inc., supra; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

Here, United argues that the federal aviation legislation bars the application of Colorado's handicap discrimination statute, both expressly and by necessary implication. However, because we conclude that Congress has

expressed a specific intent to pre-empt the operation of state laws of this nature, we need not determine the extent to which the substantive provisions of the Airline Deregulation Act and its later amendments would otherwise give rise to an implied intent to pre-empt.

As we have noted, 49 U.S.C. App. 1305 specifically prohibits the enforcement of any state law "relating to" the "services" of an air carrier. And, in similar contexts, the United States Supreme Court has instructed that Congress intended to have a broad meaning assigned to this term.

In Shaw v. Delta Airlines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), the Supreme Court construed a similar term that Congress had used in another pre-emptive provision contained within the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 (1976). There, the statute pre-empted any state law that "relate[d] to any employee benefit plan," as such plan was defined by the federal act. Holding that the relevant term, "related to," must be held to have the meaning ordinarily ascribed to it, the court concluded that any state law that "has a connection with or reference to such a plan" may not be enforced. Shaw, supra, 463 U.S. 85 at 97, 103 S.Ct. 2890 at 2891, 77 L.Ed.2d at 501. Hence, the court held that this federal legislation prohibited New York from enforcing its statute declaring it to be unlawful sex discrimination for an employer to treat pregnancy different from other nonoccupational disabilities for purposes of employee health and disability programs.

More recently, the Supreme Court applied the same analysis to the very statute that is at issue here. In Morales v. Trans World Airlines, Inc., ___ U.S. ___ , 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), the court adopted the same definition of the phrase "relating to," as used in the Airlines Deregulation Act, as it had adopted in Shaw, i.e., any law that is connected with or has reference to an airlines' rates, routes, or services is pre-empted. Therefore, a general

California statute designed to prohibit deceptive trade practices was held to be unenforceable with respect to an airline's sale of tickets. And, this was true even though there was no inconsistency between the purposes of the federal and state enactments; the pertinent provisions of 49 U.S.C. App. 1305 contain no suggestion that only inconsistent state laws are to be pre-empted.

Therefore, the specific question presented here is whether the Colorado statute prohibiting handicap discrimination in employment, if applied to an airline, can be said to have a connection with or reference to that airline's "services." We conclude that it does.

The Airlines Deregulation Act emphasizes that two of its primary purposes are the "maintenance of safety as the highest priority in air commerce" and the "placement of maximum reliance on competitive market forces." 49 U.S.C. App. 1302(a)(1) and (4) (1992). And, the nature of an airlines' services necessarily impacts upon both these purposes; these services must emphasize safety as a primary consideration, while assuring that they remain competitive in the market place. Moreover, the quality of the services rendered by an airline employee directly impacts upon the services that that airline renders to its customers.

Hence, few factors are more important in determining the nature of the services that an airline is to provide than the quality of its employees. Particularly in the case of flight personnel, both their present physical capabilities and their expectation of continued good health will have an effect upon the services to be rendered their employer. To this end, the federal legislation itself establishes minimum physical requirements for such personnel. 49 U.S.C. App. 1421 and 1422 (1952).

We conclude, therefore, that any law or regulation that restricts an airline's selection of employees, based on their physical characteristics, must necessarily have a connection with and reference to, and therefore must be one

"relating to," the services to be rendered by that airline.

The opinions issued by several courts contain rationales supporting our conclusion in this respect.

In French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989), for example, the court held that a state statute mandating an employer's drug testing procedures for employees cannot be applied to the employees of an airline. The decision was grounded upon the premise that the pertinent federal statute legislated upon a subject of such paramount interest to the federal government that uniformity required pre-emption as a matter of implied Congressional intent. Nevertheless, the court's determination necessarily mandates the conclusion that the attempted regulation of such employment restrictions relates to the services of an airline carrier.

Similarly, in World Airways, Inc. v. International Brotherhood of Teamsters, 578 F.2d 800 (9th Cir. 1978), it was held that the Federal Aviation Act, as it existed prior to its amendment by the Airlines Deregulation Act, pre-empted an arbitrator's award rendered under the provisions of the Railway Labor Act, 45 U.S.C. §184 (1970), requiring the reinstatement of a pilot to his former position. At the time of the events giving rise to the World Airway case, no express pre-emptive provision had been adopted by Congress, but the Court of Appeals found evidence of an intent to pre-empt from the substantive provisions of the previous federal act.

We are also convinced that our conclusion here is not inconsistent with the Supreme Court's decision in Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714, 83 S.Ct. 1022, 10 L.Ed.2d 84 (1963). In that case, the Supreme Court determined that the prior federal law, which did not contain the express pre-emptive provision at issue here, did not pre-empt the enforcement against an air carrier of a Colorado statute prohibiting racial discrimination in the hiring of employees.

Its decision was grounded upon the underlying premise that such a law could not have any adverse impact upon the required national uniformity because an inconsistent requirement, i.e., a requirement to engage in racial discrimination, could not be validly enforced in any state.

Here, however, that is not the case. If the states were free to regulate an airline's hiring practices with respect to applicants having, or being perceived to have, a physical handicap, the area of possible conflict would be nearly limitless. Not only could each state define for itself the very concept of a "handicap," but one state could compel the employment of persons with a particular disability and a second could prohibit such employment, while yet a third could leave the decision within the discretion of the particular airline.

The fact that such an accumulation of conflicting regulations might be possible not only serves to distinguish the issue here from that presented in Colorado Anti-Discrimination Commission, supra, but it reinforces our conclusion that Congress' expressed intent was to prohibit such a result.

II.

In light of our conclusion that the trial court properly dismissed plaintiffs' complaint in its entirety, it is unnecessary for us to consider United's assertions on its cross-appeal.

Judgment affirmed.

JUDGE SMITH and JUDGE ROTHENBERG concur.

SUPREME COURT, STATE OF COLORADO
CASE NO. 93SC135
CERTIORARI TO THE COLORADO COURT OF APPEALS, 91CA0646
DISTRICT COURT, CITY AND CITY OF DENVER, 89CV9781

ORDER OF COURT

JAMIE BELGARD-KRAUSE, JANET SQUIRE, and all other persons similarly situated,

Petitioners,

v.

UNITED AIRLINES, a Delaware corporation

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 23, 1993.
JUSTICE MULLARKEY would grant as to the following issue:

Whether in enacting the Federal Aviation Act, Congress intended to preempt the state from exercising their traditional power to prevent employment discrimination against persons with handicaps/disabilities.

JUSTICE SCOTT does not participate.

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James Benway, Clerk
Colorado Court Appeals

Supreme Court
State of Colorado
Certified to be a full, true and correct copy
AUG 23 1993
MARY V. DAVEORD
Court Seal

THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 91CA0646

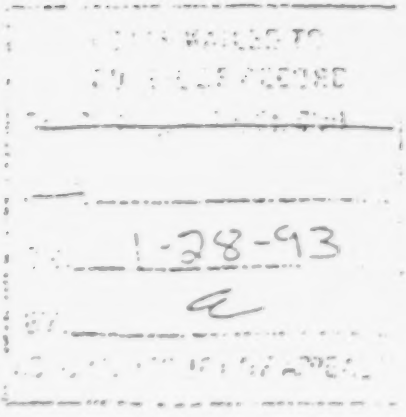
ORDER

JAMIE BELGARD ET AL V UNITED AIRLINES ET AL

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including March 01, 1993 provided that if a petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:
Criswell, J.
Smith, J.
Rothenberg, J.

DATE: January 28, 1993



No. 93-A-405

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

JAMIE BELGARD-KRAUSE, JANET SQUIRE, and all persons similarly situated,

v. *Petitioners,*

UNITED AIRLINES, a Delaware corporation,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 1993, three true and correct copies of the **PETITION FOR A WRIT OF CERTIORARI** were served on all counsel of record by depositing the same in the U.S. Mail, first class postage prepaid as follows:

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In The

Supreme Court of the United States

October Term, 1993

JAMIE BELGARD-KRAUSE, JANET SQUIRE, and all persons similarly situated,

Petitioners,

v.

UNITED AIRLINES, a Delaware corporation,

Respondent.

On Petition For A Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Colorado Court of Appeals commit any error of federal law in holding that application of Colorado's handicap discrimination statute to claims based on pilot qualifications is preempted by federal law?

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APPLICABLE STATUTES

49 U.S.C. § 1305. Federal preemption

(a) Preemption

(1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

49 U.S.C. § 1374. Duty of air carrier to provide interstate and overseas air transportation

(a) Through service in connection with other carriers; safe and adequate service, etc.; just and reasonable rates, fares and charges.

(1) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers authorized to engage in scheduled air transportation by certificate or by exemption under section 1386(b)(3) of this title; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish

just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

49 U.S.C. § 1421. Powers and duties of Secretary of Transportation

(b) Consideration of needs of service; classification of standards, rules, regulations, and certificates

In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Secretary of Transportation may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Secretary of Transportation shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air commerce in the administration and enforcement of this subchapter.

STATEMENT OF THE CASE

Petitioners filed their action, based only on Colorado state handicap discrimination law and not on any federal law, in the District Court for the City and County of Denver. Petitioners contend in their statement of the case that it was "undisputed" that the sole reason why Respondent United Airlines ("United")[1] medically evaluated pilot candidates was "cost-savings." Petition, pp. 6, 7. This is not the case. In fact, United consistently argued that its medical evaluation of pilot candidates was taken because of United's obligations under federal law to maintain safety and independently evaluate pilot candidates.

Petitioners also make a number of other factual assertions which are not based on any evidence in the record in the Colorado courts, including assertions that their vision exceeded federal standards and United's standards, that other United pilots were flying commercial jets despite a history of the same eye surgery, that other airlines did not disqualify pilot candidates who had a history of radial keratotomy surgery, that Petitioners had no side effects "or detectable conditions" from the surgery, and that they met all federal regulatory standards for commercial pilots. Petition, pp. 7-8.

Petitioners also include two legal arguments in their statement of the case. First, Petitioners assert that United employed a pre-employment "genetic" and medical screening of applicants for pilot positions, in violation of Colorado law. Petition, p. 6. As stated in the first section of United's argument, the conclusions of the Colorado Court of Appeals as to Colorado law are binding on this

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[1] The parent corporation of United is UAL Corporation.

Court, and United's practices were not found to be in violation of Colorado law. Further, there is no evidence in the record of any "genetic" testing by United.

Second, Petitioners repeatedly argue that, since they held "Class I medical certificates issued by the FAA," federal law does not permit any further inquiry by United into Petitioners' medical condition. Petition, pp. 6, 8, 9. In fact, federal regulations place upon domestic air carriers such as United an independent obligation to verify the qualifications of pilots, beyond the holding of a medical certificate. 14 C.F.R. § 121.383(a). Airlines are required to independently evaluate personal characteristics of pilot candidates that could affect safety. 14 C.F.R. § 121.413. Airlines have a statutory duty to conduct their operations to "perform their services with the highest possible degree of safety in the public interest. . . . " 49 U.S.C. § 1421(b). Accordingly, FAA medical certification regulations are considered to be "bare minimums" and, the FAA condones and supports airlines in requiring stricter standards than those established by the FAA. *Robinson v. American Airlines, Inc.*, 722 F. Supp. 757, 765, *aff'd*, 908 F.2d 1020 (D.C. Cir. 1990). Stricter standards are encouraged because the safe transportation of passengers is the essence of an air carrier's business. *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). *See also World Airways, Inc. v. Internat'l Broth. of Teamsters*, 578 F.2d 800, 808 (9th Cir. 1978) ("Regulations promulgated pursuant to the Federal Aviation Act establish that it is the *duty of the carrier* to determine the *competency of its pilots* in the interests of public safety . . . ") (emphasis added).

Finally, Petitioners fail to inform this Court that they admitted, through their counsel in oral argument before the Court of Appeals, in response to a direct question from the bench that regulation of pilot qualifications *does* "relate to" airline services. Accordingly, the Colorado Court of Appeals found that application of Colorado's handicap discrimination statute in a way which unarguably related to airline services would result in Colorado regulation of airline services. Accordingly, the Colorado courts affirmed the dismissal of Plaintiff's claims.

SUMMARY OF THE ARGUMENT

It was undisputed before the Colorado courts, and should be undisputed in this Court, that regulation of pilot qualification does, in fact, "relate to" airline services. The Colorado courts, in interpreting their own law, found that application of Colorado's handicap discrimination statutes would, in fact, result in Colorado regulation of airline services. That determination by the Colorado courts cannot be disturbed by this Court. Further, it is clear that Petitioners' state law claims did, in fact, relate to regulation of airline services, and also involved an attempt to inject state regulation into a field occupied by pervasive federal regulation.

State regulation of pilot qualifications would result in multitudinous systems for determining which pilots are qualified, and would inevitably lead to different qualification criteria from state to state. Accordingly, every single state and federal court which has considered the

issue has found that state regulation related to pilot qualifications is not permissible, and Petitioners are unable to cite a single decision from any Court permitting state regulation of pilot qualifications. Since the decision of the Colorado Court of Appeals is in accord with every other decision which has considered the issue, and is also based on the Colorado courts' interpretation of Colorado law, this Court should not grant certiorari in this case.

ARGUMENT

I. PETITIONERS' ARGUMENT WOULD REQUIRE THIS COURT'S REVIEW OF COLORADO STATE LAW.

Petitioners' claims in the District Court for the City and County of Denver were based only on state law; no federal claims were raised. As stated by Petitioners, their claims were based on Colo.Rev.Stat. § 24-34-402 and 3 Colo.Reg. 708-1 Rule 60.2 E.

As stated above, Petitioners admitted in the Colorado Courts that regulation of pilot qualifications does "relate to" airline services. Accordingly, it was left to the Colorado courts to determine whether or not application of the Colorado handicap discrimination statute would result in regulation of pilot qualifications. The Colorado Court of Appeals held that it would, and therefore that application of the Colorado statute would relate to airline services. Petitioner's Appendix, p. 6a.

It is clear that federal law preempts state regulation related to airline rates, routes and services. Here, the

Colorado Courts, in interpreting their own handicap discrimination statute and regulations, found that application of those Colorado handicap discrimination statutes and regulations would in fact result in such state regulation. This determination of Colorado law cannot be reviewed by this Court. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489 (1965). *See also Morales v. Transworld Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031, 119 L.Ed.2d 157, 166 (1992) (this Court should not review contention as to preemption of state law where the State itself would not consider its law applicable). Given the breadth of Colorado handicap discrimination law as interpreted by the Colorado courts, certiorari should not be granted by this Court to review their decision.

Petitioners assert that "the state discrimination statute does not require the hiring of an individual with a handicap who is not qualified for the job." Petition, p. 24. This assertion is not based on Colorado law, as announced by the decision of the Colorado Court of Appeals in this case, and previous decisions of Colorado courts, and in fact Colorado law is not so simplistic. As stated by the Colorado Court of Appeals, Colorado law declares that an employer can be required to hire an "otherwise qualified person," despite that person's handicap, unless there is no "reasonable accommodation" which can be made with regard to that handicap. Petitioners' Appendix, p. 2a. More importantly, Colorado law places on the *employer* the burden of proving "that there is no reasonable accommodation that the employer can make with regard to the handicap, that the handicap actually disqualifies the applicant from the job, and that

the handicap has a significant impact on the job." *Colorado Civil Rights Commission v. North Washington Fire Protection District*, 772 P.2d 70, 76 (Colo. 1989), *citing* Colo.Rev.Stat. § 24-34-402(1)(a); *Gamble v. Levits Furniture Co. of the Midwest, Inc.*, 759 P.2d 761, 765 (Colo. App. 1988); *Colorado Civil Rights Commission v. ConAgraFlour Milling Co.*, 736 P.2d 842, 846 (Colo. App. 1987), and *Silverstein v. Sisters of Charity*, 43 Colo. App. 446, 448, 614 P.2d 891, 893 (1979).

Further, the Colorado courts have also held that the Colorado handicap discrimination statute does not even apply unless the Plaintiff's physical impairment "*substantially* limits one or more of a person's *major* life activities." *North Washington*, 772 P.2d at 77, quoting Colo.Rev.Stat. § 24-34-301(4) (emphasis from *North Washington*). In emphasizing the inclusion of the words "substantially" and "major" in the statute, the Colorado Supreme Court noted that the statute's protections were not available to persons with minor handicaps, but instead requires an impairment which "substantially limits an individual's employment potential." *North Washington*, 772 P.2d at 77.

Accordingly, application of the Colorado handicap discrimination statute to pilots would require Colorado courts to determine, as a matter of Colorado law, whether or not a pilot or group of pilots was sufficiently qualified, despite a handicap which substantially limits the pilot's employment potential. This determination would be made in the context of the employer's burden to prove that the serious handicap does in fact disqualify the applicant from the job, has a serious impact on the job, and no reasonable accommodation can be made. How the

Colorado courts would evaluate the claims of candidates for positions as pilots cannot be predicted. However, it is certain that (1) the inquiry would intimately involve the Colorado courts in passing on pilot qualifications, and (2) Colorado's determination as to which pilots were qualified would inevitably conflict with the determinations of other states. Again, the conclusions of the Colorado courts as to these matters of Colorado law cannot be reviewed by this Court.

Petitioners also assert that "it is undisputed that pre-employment inquiries used to predict if an applicant is genetically predisposed to a future disability, if non-job related, violate Colorado's employment discrimination laws and regulations." Petition, p. 29. In fact, as pointed out by the Colorado Court of Appeals in this matter, "inquiries limited to a job applicant's 'ability to perform job-related functions' are permissible." Petitioner's Appendix, p. 2a. Accordingly, the Colorado courts determined that Petitioners' Colorado handicap discrimination claims would require an examination of the pre-employment inquiry's relation to the ability to perform pilot functions. Once again, this determination of Colorado law leads to the conclusion that application of the Colorado statute to pilots would result in the state passing on pilot qualifications.

II. AS WAS UNDISPUTED BELOW, AND SHOULD BE UNDISPUTED IN THIS COURT, REGULATION OF PILOT QUALIFICATIONS "RELATES TO" AIRLINE SERVICES, AND THEREFORE STATE REGULATION OF AIRLINE PILOT QUALIFICATIONS IS PRECLUDED BY THE EXPRESS PREEMPTION PROVISION OF THE FEDERAL AVIATION ACT.

As Petitioners correctly point out, federal preemption can be found in any one of three different ways: (1) express or implied preemption through a statute intended to preempt state legislation, (2) inferred preemption from pervasive federal regulation in the field, and (3) preemption of state legislation which conflicts with federal legislation. Petition, p. 13. The existence of any one of which is sufficient to find state regulation preempted. *O'Carroll v. American Airlines*, 863 F.2d 11, 12 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989).

49 U.S.C. § 1305(a)(1) states as follows:

> [N]o state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Subchapter 4 of this Chapter to provide air transportation,

Petitioners' argument in this Court is based on a contention that the term "services" in the statute does not include pilot qualifications, but instead has a "narrow meaning" including only "the type of operations offered to passengers and not the manner in which they are

provided." Petition, pp. 19, 22. Accordingly, Petitioners' argument depends on their contention that states are free to regulate the "manner" in which airlines provide services.

The first problem with Petitioners' argument is that it conflicts with Petitioners' contentions in the Colorado courts. In fact, in oral argument before the Colorado Court of Appeals, counsel for Petitioners admitted, in response to a direct question from the bench, that regulation of pilot qualifications does, in fact, "relate to" airline services. Having recognized in the Colorado courts that regulation of pilot qualifications "relates to" airline services, Petitioners cannot be permitted to withdraw that concession in this Court. *New York Lake Erie & Western R.R. Co. v. Estill*, 147 U.S. 591, 613 (1893); *Regents of the University of California v. Bakke*, 438 U.S. 265, 283 (1978); *Buchanan v. Kentucky*, 483 U.S. 402, 404 n.1 (1987).

In any event, Petitioners' admission was unavoidable, and 49 U.S.C. § 1305(a)(1) cannot be read to permit any state regulation of airline services so long as it only involves the "manner" in which services are provided as opposed to the "type."

Further, Petitioners' argument also depends upon an argument that the Colorado courts "erred in collapsing two independent inquiries into one." Petition, p. 23. That is, Petitioners argue that the scope of the word "services" in 49 U.S.C. § 1305(a)(1) must be examined without reference to the words "relate to" in the statute, and that simple examination of "the scope of the word 'services' is the key inquiry." Petition, p. 19. Petitioners' argument

simply conflicts with the Court's recent decision interpreting 49 U.S.C. § 1305(a)(1), *Morales v. Transworld Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031, 119 L.Ed.2d 157, 167 (1992), where this Court held that "the key phrase, obviously, is 'relating to' ".

In *Morales*, this Court considered whether state regulation of airline *advertising* constituted impermissible state regulation "related to" airline *rates*. This Court rejected an argument, exactly like that of the Petitioners here, that the state regulation was permissible because it did not regulate airline "rates." "This simply reads the words 'relating to' out of the statute." *Id.*, 119 L.Ed.2d at 168. In holding that regulation of airline advertisement necessarily "relates to" airline rates, this Court noted that (1) the expenses involved in operating an airline flight are almost always fixed, (2) the market for airline services is divided between consumers who are, and those who are not, affected by price, (3) airlines must therefore attempt to sell as many seats as possible to those who will pay higher prices, (4) airlines must therefore place restrictions on the number of inexpensive seats, and (5) state requirements to disclose these restrictions in advertising would require airlines to put too much information in their advertising. *Id.*, 119 L.Ed.2d at 157. Accordingly, the Court held that state regulation of airline advertising necessarily affects airline rates, and therefore "related to" airline rates.

The relationship between pilot qualifications and airline "services" present here is far less attenuated then the relationship between airline advertising and airline "rates" in *Morales*. Airlines could not provide services without qualified pilots, and could not provide those

services safely without the highest qualified pilots. More importantly, airline services would definitely be disrupted if each state had its own system for determining which pilots were qualified, resulting in pilots being qualified in some states and not others, and requiring pilot changes when planes cross state lines.

Petitioners also argue that the "savings clause" adopted with the original FAA in 1958, 49 U.S.C. § 1506, "shows the lack of Congressional intent to regulate all activities involving airlines." Petition, p. 22. This is another argument this Court disposed of in *Morales*, where the Court held that the specific preemption provision of 49 U.S.C. § 1305(a)(1) controls over that general provision, particularly "where the 'saving' clause is a relic of the pre-ADA/no pre-emption regime." *Id.*, 119 L.Ed.2d at 168.

Petitioners argue that application of the Colorado handicap discrimination statute cannot be found to be preempted by 49 U.S.C. § 1305(a)(1), because "[h]ere, the state employment discrimination statute neither makes 'reference' to 'services,' or relates to 'services.' " Petition, p. 24. Here again, Petitioners' argument was addressed and rejected in *Morales*. There, the Petitioners argued that since the advertising regulations at issue did not specifically address the airline industry, they were not preempted. *Id.*, 119 L.Ed.2d at 169. In response, this Court emphasized that the key phrase of the statute, "relating to," expresses "a broad pre-emptive purpose." Accordingly, the statute preempts "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes or services'. . . . " *Id.*, 119 L.Ed.2d at 167. Accordingly, this Court held that state regulation "relates to"

airline rates, routes and services even if the effect on airlines or their services is indirect. *Id.*, 119 L.Ed.2d at 169.

Petitioners also assert that 49 U.S.C. § 1305(a)(1) cannot be read to preclude state regulation of pilot qualifications, because there is no legislative history for the statute which mentions pilot qualifications, and instead the legislative history refers to "providing air transportation to the flying public from point to point," "*intra*state fares charged by *inter*state airlines," and "utility-type regulation." Petition, pp. 19, 20 (emphasis in original). This argument based on lack of legislative history was once again specifically rejected in *Morales*. *Id*. at 168, n.2.

Petitioners open their argument as to interpretation of 49 U.S.C. § 1305(a)(1) by citing to the decision of this Court in *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714 (1963). Petition, pp. 12-14, 17, 18, 24. This argument is absurd because *Continental* was decided long before 49 U.S.C. § 1305(a)(1) was ever enacted. More importantly, as the Colorado Court of Appeals noted in its Opinion, this Court in *Continental* made it absolutely clear that its holding was limited merely to state statutes which regulate *racial* discrimination:

> Were there a possibility that a pilot hired in Colorado *could* be barred solely because of his *color* from serving a carrier in another state, then this case might well be controlled by our prior holdings (finding state regulation to be an impermissible burden on commerce). But under our most recent decisions *any* state or federal law requiring applicants for any job to be turned

> away because of their *color* would be invalid under the Due Process Clause of the Fifth Amendment. The kind of burden that was thought *possible* in the (prior holdings) therefore, *simply cannot exist* here.

Id., 372 U.S. at 721 (emphasis added). Unlike a pilot's *race*, however, a pilot's alleged *handicap can* affect his or her qualifications. To allow each state to make its own regulations or interpretations as to whether each pilot's handicap sufficiently disqualified him or her would be to allow state regulation of the airline industry, which the express preemption provision of the FAA seeks to avoid. This Court specifically recognized this in *Continental*, and therefore stated that state law regulations which went to qualifications would be an impermissible burden on interstate commerce.

Petitioners also repeatedly cite to Department of Transportation Regulations, but fail to inform the Court that they are actually quoting from regulations for an entirely different, separate act, the Air Carrier Access Act. Petition, pp. 16-17, 24, 26, 27. Petitioners' reliance on the regulations for the Air Carrier Access Act, at 14 C.F.R. Part 382, is an improper method to attempt to interpret the preemptive provision of the Airline Deregulation Act ("ADA"), since those regulations themselves state that "The ACAA . . . is silent with respect to the rights of [airline employees]" and covers only discrimination against passengers. 14 C.F.R. 382.3. It is also improper for Petitioners to continuously cite those regulations in conjunction with the ADA, and even to suggest that the regulations were intended to define the term "services" in 49 U.S.C. § 1305(a)(1), when those regulations do not

apply to the ADA, and explicitly do not apply to airline employees. Contrary to the assertion at pages 16-17 of the Petition, nothing within the ACAA regulations suggests that anything therein was intended to define the term "services" in the FAA preemptive provision; in fact, the regulations explicitly state that the ACAA has nothing to do with the rights of airline employees. It is simply disingenuous for Petitioners to pretend that the ACAA regulations constitute an administrative interpretation of 49 U.S.C. § 1305(a)(1).

Finally, Petitioners rely on cases involving state law personal injury claims arising out of airline accidents, *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993) and *In re Air Crash Disaster at Stapleton International Airport*, 721 F. Supp. 1185 (D. Colo. 1988). Petition, pp. 25, 27. Before the Colorado Supreme Court, Petitioners had relied on *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 291, 126 L.Ed.2d 240 (1993). Such personal injury decisions, by their own terms, do not apply to before-the-fact attempts to regulate pilot qualifications. In *Hodges*, the court held that Congress did not appear to have intended to eliminate personal injury suits, since it continued to require airlines to have insurance. *Id.*, 4 F.3d at 355. The Court held that the term "services" includes "matters . . . appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline," but does not include a later tort suit against the airline.

Accordingly, the Court in *Hodges* cited with approval from *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1989) as a case in which federal preemption was clear. In *O'Carroll*, an

allegedly loud and boisterous passenger's discrimination claim for wrongful eviction from the flight was found to be preempted "because the state law claims arising from the alleged wrongful exclusion undeniably related to the services provided by the airline." *Hodges*, 4 F.3d at 356. Of course, the qualifications of pilots relate even more directly to airline services than the loudness or rudeness of passengers, and the Court in *Hodges* therefore clearly would find claims related to pilot qualifications pre-empted. Similarly, *Cleveland* specifically stated that although personal injury claims were not preempted, cases which "address pilot regulation" are properly found to be preempted. *Cleveland*, 985 F.2d at 1443, n.7.

The Colorado Court of Appeals' interpretation of 49 U.S.C. § 1305(a)(1) corresponds to the consistently broad construction given to the preemption provision, not only by *Morales*, but also by every single state or federal court which had considered the issue before *Morales*. *See Federal Express Corp. v. Tennessee Public Service Comm'n*, 925 F.2d 962, 967-68 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 59 (1991), *citing*, *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990), *cert. denied* 111 S. Ct. 307 (1990); *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1948 (1990); and *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989) ("In each case, the court construed the 'relating to' language in section 1305(a)(1) broadly to find state action preempted").

In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415 (9th Cir. 1984), the Ninth Circuit Court of Appeals concluded that 49 U.S.C. § 1305(a)(1) preempts state laws concerning the treatment of handicapped passengers,

because the state anti-discrimination laws "relat[ed] to" services within the meaning of Section 1305(a)(1). Similarly, in *Hastalis v. Illinois Human Rights Comm'n*, 205 Ill. App.3d 50, 150 Ill. Dec. 469, 562 N.E.2d 1272 (1990) the Court concluded that 49 U.S.C. § 1305(a)(1) preempts application of Illinois' state handicap discrimination law to airline's denial of boarding privileges to blind passengers. All of these decisions rejected the "narrow meaning" which Petitioners attempt to graft onto the word "services," and instead, as required by this Court in *Morales*, gave 49 U.S.C. § 1305(a)(1) the broad meaning obviously required by the statute's clear terms.

If the Colorado courts had, in fact, rejected the state and federal authority set out above, they would have made themselves the first and only Courts to allow state regulation of pilot qualifications. Because the decision of the Colorado courts is in direct accord with all federal and state authority interpreting 49 U.S.C. § 1305(a)(1), certiorari should not be granted.

III. THE PERVASIVE FEDERAL REGULATION OF THE FIELD OF PILOT QUALIFICATIONS PRECLUDES STATE LEGISLATION IN THAT FIELD.

Petitioners correctly note that United also argued in the Colorado courts that the pervasive and comprehensive scheme of federal regulation in pilot qualifications and safety preclude state regulation in that area, and is an independent basis for finding preemption. Petition, pp. 8-9. The Colorado Court of Appeals also correctly relied on the decision in *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1981). Petitioners' Appendix, p. 7a. However,

Petitioners make no response to this argument and this authority in their Petition.

The Court in *French* stated:

> We infer from the Federal Aviation Act an unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law. In our judgment, such an intent is implicit in the pervasiveness of relevant federal regulation, the dominance of the federal interest, and the legislative goal of establishing a single, uniform system of control over air safety. In this case, all flight plans lead to Washington.

Id. at 6-7. As concluded by the Court in *French*, the medical and physical limitations of persons seeking to become commercial airline pilots have a clear and direct effect on air safety. *Id.* at 7. The Court also noted that the intent of the FAA is to have a single uniform system of regulation with regard to air safety:

> In sum, establishment of a single uniform system of regulation in the area of air safety was one of the primary "object[s] sought to be obtained" by passage of the Act. *Schneidewind*, 108 S. Ct. at 1150. We agree with the Second Circuit that: "The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single authority – indeed, in one administrator – the power to frame rules for the safe and efficient use of the nation's airspace." *Airline Pilots Ass'n Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960). *It is hard to imagine an area of regulation that is more closely related to air safety than pilot qualification. And local restrictions on*

> *pilot qualification would make impossible the attainment of the centralized control and uniformity of design so plainly coveted by the Congress.*

Id. at 5 (emphasis added). *See also World Airways, Inc. v. Internat'l Broth. of Teamsters*, 578 F.2d 800, 808 (9th Cir. 1978) ("Regulations promulgated pursuant to the Federal Aviation Act establish that it is the *duty of the carrier* to determine the *competency of its pilots* in the interests of public safety . . . ") (emphasis added).

Petitioners argue, without any authority, that federal concern with a pilot's qualifications is at an end once it has determined that the pilot is eligible for a license. Petition, pp. 6, 8, 9, 29. This argument has also been consistently rejected; FAA medical certification regulations are considered to be "bare minimums" and, the FAA condones and supports airlines in requiring stricter standards than those established by the FAA. *Robinson v. American Airlines, Inc.*, 722 F. Supp. 757, 765, *aff'd*, 908 F.2d 1020 (D.C. Cir. 1990). Stricter standards are encouraged because the safe transportation of passengers is the essence of an air carrier's business. *Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

Petitioners contend that they are seeking "individualized consideration of their presumed handicaps as required by Colorado law." Petition, p. 28. However, the balance the courts of Colorado may strike in evaluating Petitioners' qualifications would certainly vary from the balance the courts of other states would strike. This is precisely the rationale which supports federal preemption. The FAA expressly preempts fifty different states

from passing on their own requirements for pilot qualifications; only the *federal* government may regulate pilot qualifications to assure the required amount of safety.

CONCLUSION

As early as 1944, Justice Jackson noted the singularity of federal control over the nation's system of commercial aviation.

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring). Since 1944, exclusive federal control has become more pervasive, and in greater need of protection from state regulation. Thus, the federal government has enacted 49 U.S.C. § 1305(a)(1), to specifically preclude state regulation.

In the Colorado courts, Petitioners admitted that state regulation of pilot qualifications "relates to" airline

services. Further, the Colorado courts determined in examining their own handicap discrimination statutes that applying them to Petitioners' claims would result in state regulation relating to airline services. Petitioners' argument in their petition not only conflicts with their position taken in the Colorado Courts, but also explicitly conflicts on several counts with this Court's recent decision in *Morales v. Transworld Airlines, Inc.*, 504 U.S. ___, 112 S. Ct. 2031, 119 L.Ed.2d 157, 167 (1992). Finally, Petitioners' arguments have been rejected by every federal and state court which has considered the issue, and there is not a single court, anywhere, which has permitted state regulation of pilot qualifications. Thus, Petitioners have not advanced any basis under S. Ct.R. 10 for this Court to exercise its discretion in granting review on writ of certiorari, and the petition should therefore be denied.

DATED: January 24, 1994.

Respectfully submitted,

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